IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY MITUNIEWICZ, Appellant.	No. 37543-5-II UNPUBLISHED OPINION

Armstrong, J. — Rodney Mituniewicz appeals his felony judgment and sentence for possessing a controlled substance. He argues that the State breached their plea bargain and sentencing agreement by failing to recommend "no community custody" at his sentencing hearing, thereby violating his right to due process. He further claims that the court erred by not considering his request for an exceptional community custody term to reduce his sentence. He seeks to either withdraw his guilty plea or compel specific performance of it. Because the trial court fully informed Mituniewicz of the consequences of his plea and that community custody was mandatory, we affirm.

FACTS

In September 2007, two police officers saw Mituniewicz driving in Clark County and stopped him because they believed he did not have a valid driver's license. As Mituniewicz attempted to remove his wallet in order to present his identification, a bag of heroin stuck to it.

The Clark County prosecuting attorney charged Mituniewicz with possession of a controlled substance—heroin, under RCW 69.50.4013(1) on September 28, 2007. In the State's

offer of settlement, also dated September 28, 2007, the State agreed to recommend 366 days' confinement, the low end of the standard range, in exchange for a guilty plea.[1] The State did not check the section of its plea offer labeled "community custody." Clerk's Papers (CP) at 16.

In February 2008, Mituniewicz pleaded guilty to possession of a controlled substance. He also signed the statement of defendant on plea of guilty, which specified a 12 to 24 month standard range sentence for the crime and a 9 to 12 month community custody range. The same document contains the prosecutor's recommended 366 days of confinement; it contains no recommended term of community custody. The relevant part reads, "The prosecuting attorney will make the following recommendation to the judge: 366 days. . . . The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference." CP at 10-11.

At Mituniewicz's change of plea hearing, the court engaged Mituniewicz in the following colloquy:

> THE COURT: . . . [S]tandard range for actual confinement is between 12 and 24 months . . . you will be subject to community custody as probation . . . up to another 12 months . . . . Do you understand those consequences?
> MR. MITUNIEWICZ: Yes, I do, Your Honor.
> THE COURT: Well, the Prosecution has made a recommendation of 366 days. Are you familiar with that recommendation?
> MR. MITUNIEWICZ: Yes, I am, Your Honor.
> THE COURT: Do you also understand that I do not have to follow that recommendation?
> MR. MITUNIEWICZ: Yes, Your honor.
> . . . .
> THE COURT: . . . So, knowing . . . the consequences you face, do you still wish to plead guilty to this charge?
> MR. MITUNIEWICZ: Yes, I do, Your Honor.

[1] The guidelines for sentencing for this crime are 12 to 24 months' confinement and a statutorily-mandated 9 to 12 months' community custody. RCW 9.94A.517; WAC 437-20-010.

> THE COURT: Are you making this decision to plead guilty freely and voluntarily?
> MR. MITUNIEWICZ: Yes, I am.

Report of Proceedings (RP) at 39-41.

At sentencing, the State recommended 366 days' confinement as well as 9 to 12 months of community custody Mituniewicz's attorney objected, pointing out that the offer of settlement was silent on the issue of community custody. Counsel stated that although he had told his client that community custody was statutorily mandated, he was asking the court to impose an exceptional sentence that did not include community custody:

> In this case . . . the offer . . . was silent on the issue of community custody. My client . . . says, hey, I don't want any community custody. . . . So, if there's any way for the Court not to impose community supervision. I've explained to my client that that's just [sic] statutory part of it. Our position is, the offer indicated, either by error or by intention, no community custody. . . .

RP at 43.

The court responded that community custody was required: "I wish I had some discretion . . . [w]e don't have that . . . ." RP at 46. The court explained that if it failed to impose community custody, the Department of Corrections would send the case back for the court to correct the sentence. The court then sentenced Mituniewicz to the low end of the standard range plus the statutorily mandated 9 to 12 month community custody term.

ANALYSIS

I. Due Process

Mituniewicz argues that the State violated his due process rights by offering him a plea that misinformed him about the consequences of his guilty plea. He maintains that the State's silence as to community custody in its plea offer amounted to a promise that it would recommend

an exceptional sentence of no community custody term, which the State then failed to do. He concludes that this failure renders his guilty plea involuntary because it was based on misinformation. Thus, according to Mituniewicz, he is entitled to either withdraw his guilty plea or compel the State to specifically perform the plea agreement with resentencing before a different judge.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); *see also* CrR 4.2(d). A defendant may challenge the voluntariness of a guilty plea if he is misinformed about sentencing consequences before pleading guilty, resulting in a more onerous sentence than anticipated. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). An involuntary plea amounts to a manifest injustice and is subject to remedy. CrR 4.2(f) (the court may allow withdrawal of a guilty plea only to correct manifest injustice); *Mendoza*, 157 Wn.2d at 587. Where the State fails to make its promised recommendations at sentencing, the defendant may either withdraw the plea or seek resentencing before a different judge. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988) (citing *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977)).

But the purpose of the remedies is to correct a manifest injustice resulting from the defendant's reliance on a plea agreement that the State does not honor. *In re Isadora*, 151 Wn.2d at 298; *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996); *Miller*, 110 Wn.2d at 531; *Tourtellotte*, 88 Wn.2d at 584. Here, Mituniewicz cannot show a manifest injustice. We question whether the State's failure to check the community custody provision amounts to a representation

that it would recommend *no* community custody. But even if we assume it did, both the sentencing court and Mituniewicz's attorney advised him before he pleaded guilty that the community custody term was statutorily mandated. And Mituniewicz said he understood this consequence. Thus, Mituniewicz cannot demonstrate that he relied on the State's failure to check the community custody provision in entering his plea.

II. Exceptional Sentence without Community Custody

Nonetheless, Mituniewicz contends that the trial court abused its discretion by failing to consider his request for an exceptional term of community custody.

The sentencing court has discretion in sentencing and "is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea." RCW 9.94A.431(2). "The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice." RCW 9.94A.431(1). The court is not absolutely bound by a statutory minimum where it conflicts with the terms of a plea agreement. *Miller*, 110 Wn.2d at 532 (citing *State v. Cosner*, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975)). The sentencing court must seriously consider a defendant's request for an exceptional sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

Even if we assume that the trial court had the power to impose a sentence without community custody, the record demonstrated that the court fully considered the issue. In addition to discussing the mandate to impose community custody, the court considered Mituniewicz's habitual criminal conduct. This demonstrated that the court considered the merits of

Mituniewicz's request for no community custody. We find no abuse of discretion in the court's denial of the request.

III. Statement of Additional Grounds

Mituniewicz contends in his statement of additional grounds (SAG) that he was under the influence of oxycodone during his sentencing hearing and has "no mental recall of court appearance," creating a presumption that he was not competent to voluntarily plead guilty. SAG at 2. The record contains no support for this claim. He readily responded to the court's questions and nothing in his behavior suggested that he was under the influence of any drug.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.